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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 14/2/2006

C O R A M

THE HONOURABLE Mr. JUSTICE C.NAGAPPAN

Civil Revision Petition (PD) No. 52 of 2004

R.Sivasubramanian ... Petitioner/Defendant

Vs

S. Balamurugan ... Respondent/Plaintiff

Civil Revision Petition is filed Under Article 227 of the Constitution of India preferred against the order and decretal order dated 9.10.2003 made in I.A.No.729 of 2003 in O.S.No.247 of 2002 on the file of the Principal District Munsif Court, Mayiladuthurai.

For Petitioner ... Mr.P.Rajagopal
For Respondent ... Mr.A.Muthukumar

O R D E R

The revision petitioner has sought for setting aside the Order dated 9.10.2003 made in I.A.No.729 of 2003 in O.S.No.247 of 2002 on the file of the Principal District Munsif Court, Mayiladuthurai. The revision petitioner is the defendant in the suit.

2. The respondent/plaintiff filed the suit seeking a decree for permanent injunction restraining the petitioner/defendant from interfering with his possession and enjoyment of the suit property either by cutting the fence or by shifting the same and pending the suit, the petitioner/defendant filed an Interlocutory Application in I.A.No.61 of 2003 seeking for appointment of a Surveyor attached to the Taluk Office, Tharangambadi as Commissioner in order to measure the suit property and fix the boundary and the trial Court allowed the Interlocutory Application and appointed the Surveyor as Commissioner and he inspected the suit property and measured the same in the presence of both parties and also their Advocates and submitted his Report. The respondent/plaintiff filed his objections to the report. Later, the respondent/plaintiff filed another Interlocutory Application in I.A.No.729 of 2003 seeking for appointment of a District Head Surveyor as Commissioner to measure the suit property and submit a Report and that application was allowed by the trial court and challenging the same, the defendant in the suit has preferred the

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present revision.

3. The learned counsel for the revision petitioner submits that the impugned Order appointing the second Commissioner without assigning any reason and without rendering any opinion as to the Report of the earlier Commissioner is contrary to law and in support of his contention he relies on decisions of this Court in R.VISWANATHAN v.. P.SHANMUGHAM [1985 (1) MLJ 254] and K.KANDASWAMY AND ANOTHER v.. K.C.RAMASWAMI & OTHERS [1988 (2) LW 440]. Per contra, the learned counsel for the respondent contends that the earlier Commissioner measured only the defendant's property and that too not in accordance with the document and the respondent herein has filed his objections to the Commissioner's Report and that necessitated the filing of the second Interlocutory Application seeking for appointment of a fresh Commissioner.

4. The trial court in the impugned order has not discussed the earlier Commissioner's Report and has not expressed its opinion before appointing the second Commissioner. S.NAINAR SUNDARAM, J. [As he then was] in the first decision referred above has considered the similar question and has held as follows:

> "It is well settled proposition that until the Court is dissatisfied with the proceedings and report of the Commissioner earlier appointed, it will not be proper to ignore the same and direct even further enquiry, much less the scrapping of the earlier report as a whole and appoint a fresh Commission. The power in this behalf is circumscribed by the principles under Order 26 Rule 10(3) of the Civil Procedure Code, hereinafter referred to as the Code. The power has to be exercised only after the Court below renders a finding that the proceedings and the report of the earlier Commissioner are not satisfactory and there is need for a further enquiry. In the present case, the order of the Court below does not express an opinion that the proceedings and the report of the earlier Commissioner are not satisfactory. The court below has opined that the truth or otherwise of the allegations thrown against the Commissioner's report need not be gone into and it is better to change the Commissioner. It has proceeded on the basis that allegations are thrown against the earlier Commissioner and hence, it is not fair to accept his report. This is not the proper method of dealing with an application of the present nature."

5. Following the above decision, Sathiadev, J. in the second decision referred above, considered the necessity for appointment of the second Commissioner based on the objections filed by the parties to the earlier Commissioner's Report and held as follows:

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"Merely because certain objections have been filed, it would not result in a second Commissioner being appointed, on that day itself. Learned counsel for the petitioner relies on the decision in VISWANATHAN v.. SHANMUGHAM AND ANOTHER [1985-1-MLJ 254], to show as to when exactly the report of a previous Commissioner could be scrapped. It is obligatory on the part of the Court to give convincing reasons as to why the previous report filed cannot be acted upon."

6. I am in respectful agreement with the views expressed by the learned Judges in the above decisions. In the present case, merely because objections were filed by the respondent herein to the earlier report, the trial court cannot appoint a second Commissioner unless it renders a finding that the earlier commissioner's Report is unsatisfactory. No such finding of dissatisfaction has been made in the impugned order and hence it is liable to be set aside.

7. The civil revision petition is allowed and the impugned Order is set aside and the Interlocutory Application in I.A.No.729 of 2003 is remitted back to the file of the Court below. The trial court is directed to dispose of the matter in accordance with law after hearing both parties. No costs. Consequently, CMP No.549 of 2004 is closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

pb

To

1. The Principal District
Munsif, Mayiladuthurai.

2.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.A.Muthukumar. Advocate Sr 6533
+1cc to Mr.P.Rajagopal, Advocate Sr 6470

JE (CO)
km/27.2.

C.R.P.(PD)No. 52 of 2004

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